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No. ——

IN THE
Supreme Court of the United States

JANE DOE, A MINOR, BY HER PARENTS AND NEXT FRIENDS, JOHN DOE AND JUNE DOE, PARENTS,

Petitioners,

v.

ARLINGTON COUNTY SCHOOL BOARD,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fourth Circuit erroneously placed the burden of proof under the Individuals with Disabilities Education Act ("IDEA") on the parents challenging education placements at the administrative level and again in court, in contrast to the better reasoned approaches taken by the majority of the Courts of Appeal and the Supreme Court of New Jersey.

2. Whether the Fourth Circuit erred in affirming the District Court's refusal to consider the evidence sought and that proffered by Petitioners, and whether its ruling contradicts the express provisions of IDEA and this Court's decision in *Hendrick Hudson Central School District v. Rowley,* 458 U.S. 176, (1982), and conflicts with the decisions of most of the Courts of Appeal considering the issue.

3. Whether the Fourth Circuit erroneously characterized Petitioners' claim of systemic violations of §504 and §1983 as "derivative" of the IDEA claims and denied Petitioners a jury trial on these claims, as required under *Lytle v. Household Mfg., Inc.,* 494 U.S. 545 (1990), on the spurious grounds of failure to exhaust administrative remedies.

PARTIES TO THE PROCEEDINGS

The following parties were plaintiffs in the District Court and were allowed to proceed under pseudonyms of Jane Doe, John Doe and June Doe.

The following parties were defendants in the District Court: The Arlington County [Virginia] School Board and Alvin Crawley. Claims against Mr. Crawley were dismissed by the District Court and Mr. Crawley is not a party to this Petition.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Jane Doe and her parents, John and June Doe, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on March 20, 2000.

OPINIONS BELOW

The opinion of the Court of Appeals (1a)[1] affirming the lower court's opinion is not reported. The District Court's March 18, 1999 opinion granting the motion for summary judgment filed by the Arlington County School Board ("the

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[1] References to the Appendix to this Petition are "a" followed by the page number.

School Board") is reported at 41 F. Supp. 2d 599 (E.D. Va. 1999). (5a). The District Court's January 8, 1999 Order rejecting Petitioner's request to present additional evidence and ruling that the case would be decided on the administrative record is unreported. (25a).

JURISDICTION

The judgment of the Court of Appeals was entered on March 20, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS

Individuals With Disabilities Education Act ("IDEA")[2]

20 U.S.C. § 1415. Procedural safeguards

(a) Establishment of procedures

Any State educational agency, State agency, or local educational agency that receives assistance under this part shall establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies.

(b) Types of procedures

The procedures required by this section shall include-

* * *

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[2] The IDEA was amended by Congress and enacted into law on June 4, 1997 and subsequently recodified. The references made herein are to the recodified IDEA.

(6) an opportunity to present complaints with respect to any manner relating to identification, evaluation or educational placement of the child, or the provision of a free appropriate public education to such child;

* * *

(f) Impartial due process hearing

(1) In general

Whenever a complaint has been received under subsection (b)(6) or (k) of this section, the parents involved in such complaint shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency.

* * *

(g) Appeal

If the hearing required by subsection (f) is conducted by a local educational agency, any party aggrieved by the findings and decision rendered in such hearing may appeal such findings and decision to the State education agency. Such agency shall conduct an impartial review of such decision. The officer conducting the review shall make an independent decision upon the completion of such review.

(i) Administrative procedures

(1) In general

(A) Decision made in hearing

A decision made in a hearing conducted pursuant to subsection (f) or (k) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (g) of this section and paragraph (2) of this subsection.

(B) Decision made at appeal

A decision made under subsection (g) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Right to bring civil action

(A) In general

Any party aggrieved by the findings and decision made under subsection (f) or (k) of this section who does not have the right to an appeal under subsection (g), and any party aggrieved by the findings and decision under this subsection, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy.

(B) Additional requirements

In any action brought under this paragraph, the court

(i) shall receive the records of the administrative proceedings;

(ii) shall hear additional evidence at the request of a party; and

(iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

* * *

29 U.S.C. § 794. Nondiscrimination under Federal grants and programs

(a) Promulgation of rules and regulations. No otherwise qualified individual with a disability in the United States, as defined in section 7(8), shall, solely by reason of her or his disability, be excluded from the participation in, be denied the

benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978.

* * *

(b) "Program or activity" defined. For the purposes of this section, the term "program or activity" means all of the operations of--

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 14101 of the Elementary and Secondary Education Act of 1965), system of vocational education, or other school system.

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and

laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

INTRODUCTION AND STATEMENT OF THE CASE

This case arises from efforts by Petitioners to have their daughter mainstreamted, *i.e.*, educated in a regular classroom with other students her age and to vindicate their statutory right to administrative and judicial review of the decisions by the School Board rejecting their requests. Petitioners exhausted their administrative remedies and appealed to the District Court two administrative decisions which affirmed the placement decision of the School Board.

Individuals With Disabilities Education Act ("IDEA") is a comprehensive federal education statute which grants disabled students the right to a public education, provides financial assistance to states meeting their educational needs, and conditions a state's federal funding on its having in place a policy that ensures a "free public education" is available to all children with disabilities. 20 U.S.C.§ 1412 (a)(1).

This case presents the fundamental question of the proper role of the federal district court in exercising its statutory duty pursuant to IDEA to receive the records of the administrative proceedings, to hear additional evidence at the request of the parties, and based upon a preponderance of the evidence grant such relief as the court determines is appropriate.

The IDEA mandates that school systems provide to school age children with disabilities special education services to meet their unique needs. IDEA provides extensive procedural safeguards to ensure the full participation of a disabled child's parents in the formulation of their child's individualized education plan (IEP). IDEA provides both parents and school systems access to administrative procedures to resolve IEP disputes. 20 U.S.C. § 1415(f).

Either party aggrieved by the state administrative decision may bring a civil action in a federal district court. Jurisdiction is conferred upon the federal district court by 20 U.S.C. § 1415 (i)(2)(A).

The IDEA specifically requires that to the maximum extent appropriate, handicapped children "are educated with children who are not handicapped." 20 U.S.C. § 1412(a)(5)(B). Moreover, the eligibility requirements of the IDEA provided that the removal of handicapped children from the regular classroom occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

"A child with a disability is *not* removed from education in age-appropriate regular classrooms solely because of needed modifications in the general curriculum." *64 Fed Reg.* 12,457, 12,458 (to be codified at 34 C.F.R. § 300.552(e)) (emphasis added). The regulations make clear that the type or degree of modifications to the general curriculum that a child may need should not be used by the agency to inappropriately justify the child's removal from education in the regular classroom. *Id.*

Petitioners alleged that the School Board, in addition to violating the IDEA, also discriminated against Jane Doe under § 504 of the Rehabilitation Act and that the School Board's denial of an appropriate "mainstream" education to Jane Doe resulted from an official "policy or custom" of the Board in violation of §1983.

1. ***Jane Doe's Educational Program.*** Jane Doe, now twelve years old, suffers from neurodevelopmental dyspraxia and attention deficit hyper-activity disorder (ADHD). She has been labeled as mentally retarded by the School Board. Administrative Record ("A.R.") 222-224, 349. Physically, Jane Doe is a normal child, A.R. 103, 213, and is "a

delightful little girl who is very eager to participate in the educational environment" at Arlington Traditional School ("ATS"). A.R. 218.[3]

In 1993, Jane Doe was accepted at ATS for kindergarten along with her twin sister under the lottery system used to determine who attended. From the onset of her admission to ATS, the School Board sought to isolate Jane Doe from her peers. Holly Hawthorne, the principal, wanted to place Jane Doe in an early childhood development class—a county-wide special education segregated classroom setting for children with severe handicaps. A.R. 95.

Jane Doe academically performed better in group settings with her non-disabled peers, as opposed to individual one-on-one instruction. For example, prior to January 1995, Jane Doe was receiving individual services for speech and language instruction. A.R. 245. In late January-February 1995, Jane Doe began receiving speech and language instruction in a group setting. *Id.* The school's Speech-Language Pathologist noted that "[s]ince she became a part of the group, noncompliant behavior has decreased significantly. She appears to enjoy the group setting and has become an active and enthusiastic participant." *Id.* Since being placed in a self-contained setting, Jane Doe's test scores dropped significantly. A.R. 202 - 205, 221, 272, 273, 278.

While Jane Doe was in first grade, she participated in all classroom activities with non-disabled peers; attended art, music, and Physical Education with her classmates; received Science and Social Studies instruction with her non-disabled peers, and received the majority of her Language Arts and Math instruction in the classroom with modifications and adaptions to the curriculum. A.R. 202. In her Educational Evaluation Triennial Assessment dated March 18, 1996, it

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[3] The reference is to the Administrative Record.

was noted that "[s]ocial behaviors in the classroom setting have improved markedly." *Id.* Jane Doe is "usually cooperative, stays at her desk, and attempts to follow classroom routines and completes class work." *Id.*

After first grade, in June 1996, an IEP was established for Jane Doe under which she would receive only speech services (75 minutes each week) and occupational therapy (60 minutes each week) in a special education setting. A.R. 32. All other education was to be provided in the general education classroom, including 12 - 14 hours of special education services. *Id.* To facilitate implementation of the June 1996 IEP, Petitioners obtained a complete independent educational analysis, including speech, educational, neurological, and psychological evaluation. A.R. 356.

As a result of the independent educational analysis, Jane Doe was diagnosed with neuro-developmental dyspraxia. A.R. 222-224, 349. However, a Special Education Committee refused to accept this classification and rather than implement Jane Doe's agreed-upon June 1996 IEP at ATS, ACPS officials attempted to immediately place the child in another school.

Because Jane Doe enjoyed interacting with her peers at school and thrived in the social opportunities such an environment provided, her parents attempted to maximize her inclusionary treatment and mainstream activities at school. However, in October 1996, only months after ACPS determined that Jane Doe should only receive 12 to 14 hours of special education services in the general education classroom rather than in a self-contained setting, the School Board developed and implemented a new IEP mandating that almost all of Jane Doe's education be provided in a self-contained setting. The Petioners never agreed to this IEP. A.R. 33.

A Due Process Hearing was requested by Petitioners because the School Board wanted to implement the October 1996 IEP in another school, rather than in Jane Doe's home "magnet" school. Petitioners also requested that their daughter receive mathematics, handwriting, and language arts instruction in a regular classroom with supplemental services and curriculum modifications. A.R. 351, 356. The parents made several attempts to negotiate and work with the school system administrators, teachers, and staff resources before, during, and after due process procedures to get ATS to mainstream Jane Doe. A.R. 356. The School System simply refused to comply. *Id.*

2. The Administrative Hearings and Decisions. In April 2, 1997, Administrative Hearing Officer Maxson upheld the validity of the "latest" [October 1996] IEP for Jane Doe, despite the fact that her parents protested it. A.R. 437. Petitioners appealed portions of this decision to a State Level Review since it did not conform to the evidence on the record and requested that the October 1996 IEP be implemented in regular classrooms.

On August 21, 1997, Administrative Hearing Officer Baugh who had conducted the State Level Review, affirmed the April 2, 1997 decision but also initiated yet another un-agreed-to IEP. In addition to the legal errors, Mr. Baugh erred by ignoring the objective evidence presented by the Petitioners and their witnesses and instead relied upon the views of Jane Doe's second grade teacher who, in addition to having no training dealing with special education and mainstreaming of handicapped students, simply did not want to accommodate Jane Doe in her class. A.R. 467. Mr. Baugh's decision contains numerous errors of fact and law and also fails to take into consideration the changes mandated by the IDEA Improvement Act of 1997, Public Law. No. 105-17.

The administrative hearings held to review Jane Doe's educational placement were conducted by Hearing Officers appointed by the Virginia Supreme Court to hold hearings in a wide variety of cases. *Regulations Governing Special Education Programs for Children with Disabilities in Virginia,* §3.4 Procedural Safeguards, ¶A.6 at 33. The Hearing Officers who hear special education cases are appointed from a list maintained by the Office of the Executive Secretary of the Supreme Court and receive very limited training from the Virginia Department of Education. *Rules of the Virginia Supreme Court: Hearing Officer System*, Rule Three (B). The Hearing Officers are paid $75 per hour. *Id.* Rule Six (B)

The procedures followed in the administrative hearings lacked the safeguards provided by the rules of evidence and hearsay was freely admitted. *Rules of the Virginia Supreme Court: Hearing Officer System*, Rule Four. While parents of handicapped students are advised they may proceed *pro se*, they are ***not*** advised that witnesses who are not called in administrative hearings will not be allowed to testify in court. Virginia Dep.'t of Education, "The Special Education Due Process Hearings (undated).

In this case, both Hearing Officers placed the burden of proof under the IDEA on Petitioners to establish that the educational placement proposed by ACPS was inappropriate. The first Hearing Officers based his analysis on the legal conclusion that "IDEA contains a presumption in favor of the placement contained in a school systems's IEP." J.A. at 1038-1039, citing *Alamo Heights Indep. Sch. Dist. v. Bd. Of Educ.*, 790 F.2d 1153, 1158 (5th Cir. 1988).

3. *The School Board's Policies and Practices.* The School Board has long had a policy of non-compliance with the IDEA. The principal written evidence of this unlawful policy is contained in a Memorandum from the Director, Student Services, and Deputy Director of Special Education dated

November 2, 1993. (27-a). This internal memorandum prepared by the ACPS Special Education Department was sent to then-School Superintendent Arthur W. Gosling informing him that ACPS' "current practice of placing students into self-contained classes does not seem defensible when held to the standard of least restrictive environment." Attached to the memorandum was a paper prepared by the Special Education Department outlining the current status of special education in Arlington Schools. It stated that "Examination of the numbers of students in self-contained classes supports the conclusion that this is the Arlington delivery model of choice." The paper called for a change in the School Board's policies.

In response, School Superintendent Gosling, recognizing inadequacies in Respondent's programs, unequivocally agreed that the School Board's "practices [in the area of Special Education] are ***inconsistent with these nationwide trends as well as with recent court decisions***." (28a) (emphasis added). Superintendent Gosling stated to the administrative staff that: "Self-contained classrooms and services as cornerstones of our program delivery strategies **no longer are acceptable**." *Id.*

As a result of the systemic deficiencies in the School Board's practices in providing special education services to disabled children, ACPS began in 1994 to implement a Five Year Plan for the Integration of Special Education Students. The Office of Special Education noted in its memorandum that "careful examination of the large numbers of students being served in restrictive environments requires change." (30a). Thus, as early as November 1993 when these "Smoking Gun" memoranda were written, ACPS knew about serious systemic deficiencies in its special education program, as evidenced by the internal "Smoking Gun" memorandum prepared by the ACPS Special Education Department and that

self-contained classrooms such as the ones offered Jane Doe, were unacceptable. These documents demonstrate that the School Board knowingly failed to comply with IDEA and §504.

Notwithstanding this unambiguous recognition of deficiencies in the School Board's Special Education program, the School Board continued its custom or practice of failing to enforce the IDEA and §504 of the Rehabilitation Act by only slowly modifying its policies over an extended period of time through its five-year plan. The need for such a plan and, indeed, the very existence of such a plan is compelling evidence that the School Board is not in compliance with the law. The Board's refusal to provide Jane Doe with an appropriate education in a general classroom setting is simply a manifestation in the case of one individual of the School Board's systemic failure to comply with the IDEA. Rather than engage in a careful child-by-child analysis of the proper placement, the School Board places a very large number of students in self contained class rooms under the pretext that this is in the best interest of the child. The Board's policy is contrary to the mandatory "least restrictive environment," required by law.

4. Judicial Proceedings. Following exhaustion of administrative remedies, Petitioners brought suit in U.S. District Court under IDEA, §504 and §1983. Petitioners designated Dr. Jerome Bruns, who for 21 years was Director of Student Services for the Falls Church School System, as their expert witness. Dr. Bruns believes in mainstreaming handicapped students and had extensive experience in implementing IDEA.

Dr. Bruns evaluated and observed Jane Doe in her self-contained classroom setting at ATS. In his deposition, he testified that he observed a child who was attentive, on task, not difficult to direct, and who responded to a variety of situations in a normal fashion. He concluded that Jane Doe

would not be identified as a child with special needs. Dr. Bruns reached conclusions opposite from those of the Hearing Officers and testified that Jane Doe would benefit both academically and socially if she received her core academic subjects in the general education classroom.

However, on January 8, 1999, prior to granting the School Board's Motion for Summary Judgment, the District Court ruled that the case would be decided on the administrative record and removed the case from the trial docket. (25a). Dr. Bruns' insightful contributions to the dispute were excluded. Judge Hilton, in rejecting Petitioner's request to present additional evidence, stated, "the Court finds what plaintiffs seek to produce is not additional evidence to amplify or clarify the evidence in the administrative record. Rather, Plaintiffs seek to present evidence available at the time of the administrative hearings, but which they chose not to present at that time." *Id.* The Court found there were "no issues of material fact in dispute and this case is ripe for summary judgment." The Court also rejected Petitioners' appeal from the decision of the Magistrate Judge denying them an opportunity to take a deposition of the School Board pursuant to Fed.R.Civ.P. 30(b)(6). *Id.*

The District Court ruled that: "Matters which were not raised in the state administrative hearings are precluded from being raised in this Court." (26a). Although acknowledging that additional evidence may be presented, the District Court ruled that "the admission of additional evidence contemplated by 20 U.S.C. § 1514(e)(2) should not be allowed when it would "reduce the proceedings before the state agency to a mere dress rehearsal by allowing appellants to transform the Act's judicial review mechanism into an unrestricted trial de novo." *Id.* (citation omitted).

In issuing its Memorandum Opinion granting the School Board's Motion for Summary Judgment, the District Court

stated: "The Court has previously ruled that no facts are in dispute and this case should be decided on the administrative record." (5a). The District Court ruled that Petitioners again carried the burden of proving the administrative decisions were inaccurate, but that Petitioners could not present additional evidence to the Court. The District Court ruled that Petitioners' §504 and §1983 claims were "derivative" of their IDEA claims. (18a) The Court dismissed the §504 claims for failure to completely exhaust administrative remedies and ruled, notwithstanding the Smoking Gun memoranda, that Petitioners failed to prove their §1983 claims.

The Court of Appeals for the Fourth Circuit affirmed, stating: "Administrative findings in an IDEA case 'are entitled to be considered prima facie correct." (2a) (citation omitted). The Court of Appeals accepted the District Court's view of the evidence supporting the hearing examiner. *Id.* The Court of Appeals also affirmed the District Court's rejection of Petitioner's §504 claims on the grounds that such claim was both "derivative" of the IDEA claim and waived for failure to fully exhaust administrative remedies. The Court of Appeals affirmed the dismissal of the §1983 claims because Petitioners did not prevail on their IDEA and §504 claims. *Id.* The Court of Appeals rejected Petitioners' other arguments and affirmed "for the reasons stated by the district court."(3a).

REASONS FOR GRANTING THE PETITION

It is of vital importance that parents of students with disabilities who are aggrieved by refusal of their school system to comply with IDEA be permitted full and unfettered access to federal courts. IDEA expressly guarantees parents the right to judicial review of local school board decisions refusing to mainstream their children and the right to introduce evidence in the district court.

IDEA creates a presumption that students who are disabled should be mainstreamed, that is, students with disabilities should be educated in the same classroom as their nondisabled peers. However, according to the National Council on Disabilities, thirty-six states currently fail to ensure that children with disabilities are not segregated from regular classrooms. National Council on Disability, *Back to School on Civil Rights-Advancing the Federal Commitment to Leave No Child Behind*, (Government Printing Office 2000) at 8.

Almost six million children and young people with disabilities, who are ages three through twenty-one, qualify for educational intervention under IDEA. *Id.* at 6. Many of these children and young people with disabilities file administrative appeals and lawsuits as a result of the school systems' failure to comply with IDEA by establishing appropriate IEPs for the students who qualify for special assistance under IDEA. *Id.* at 7. "[F]ew areas in special education have been the subject of more debate and controversy" than whether handicapped children are placed in appropriate environment. M.L. Yell, *The Law and Special Education*, (Prentice Hall, Inc. 1998) at 246, 250.

Thus, resolution of the issues raised in this Petition will determine the manner in which IDEA is implemented and whether parents seeking to exercise their right to judicial review of their children's IEP's will have meaningful access to the courts. These issues affect the education received by the almost six million children and young people with disabilities.

The Court should grant review of the first question presented because of the importance of the issue and because there is a split among the Circuits as to which party bears the burden of proof in an administrative and judicial challenges to the IEP prepared by the school system.

The Fourth Circuit's approach effectively denies Petitioners and others similarly situated any meaningful opportunity to exercise their statutory right to appeal adverse educational placement decisions to district court pursuant to 20 U.S.C. §1415(e)(2) and is contrary to the standards articulated by many United States Courts of Appeal and the Supreme Court of New Jersey.

The Court should grant review of the second question presented because there is a split in the Circuits regarding the meaning of this Court's decision in *Hendrick Hudson Central School District v. Rowley*, 456 U.S. 176 (1988), and what additional evidence a District Court should consider in litigation brought under IDEA. The Fourth Circuit's ruling substantially denies Petitioners' statutory right to introduce "additional evidence" to supplement the administrative record guaranteed by 20 U.S.C. § 1415(e)(2) and the opinions of most of the Courts of Appeal.

The Court should grant review of the third question because the Fourth Circuit's analysis of the exhaustion issue deprived Petitioners of their right to a jury trial on their §504 and §1983 claims, as required by this Court's teachings in *Lytle v. Household Mfg., Inc.*, 494 U.S. 545 (1990). There is also a split in the Circuits as to whether IDEA's exhaustion of administrative remedies requirement applies to §504 and §1983 claims, where Petitioners have evidence of systemic discrimination and a custom and practice of segregating handicapped students.

If the Fourth Circuit's decision is allowed to stand, it will improperly impair the parents' statutory rights to seek review of decisions regarding education of their handicapped children and thwart the clearly expressed intent of Congress to grant parents the right to meaningful judicial review of decisions made by the school board not to mainstream their handicapped children.

I. THE FOURTH CIRCUIT ERRONEOUSLY PLACED THE BURDEN OF PROOF ON THE PARENTS BOTH AT THE ADMINISTRATIVE AND JUDICIAL LEVELS, IN CONTRAST TO THE BETTER REASONED APPROACHES TAKEN BY THE MAJORITY OF THE COURTS OF APPEAL AND THE SUPREME COURT OF NEW JERSEY.

The Hearing Officer, in accordance with the law of the Fourth Circuit, placed a heavy burden of proof on the parents to prove the School Board erred in failing to mainstream their daughter. The Hearing Office required Petitioners to "establish *both* that the program proposed by the school system is *inappropriate* and that the program which the parents prefer is appropriate." J.A. 1038-1039 (citations omitted)(emphasis in original). This approach, deferring to the decision of the school system, is also taken by the Fifth, Sixth and Tenth Circuits. *Salley v. St. Tammany*, 57 F.3d 458, 467, 5th Cir. 1995) ("The party attacking the IEP bears the burden of demonstrating its inappropriateness."); *Doe v. Board of Education of Tullahoma City Schools*, 9 F.3d 455, 458 (6th Cir) (same), *cert. den.*, 511 U.S. 1108 (1994); *Johnson v. Ind. School Dist. No. 4*, 921 F.2d 1022, 1026 (same) (10th Cir. 1990), *cert. den.*, 500 U.S. 905 (1991).

The Second, Third, Eighth and Nine Circuits, recognizing the emphasis Congress placed on mainstreaming handicapped students, have placed the burden of proof of defending the IEP at the administrative level on the school. *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 122 (2d Cir. 1998); *Carlisle Area School v. Scott P.*, 62 F.3d 520, 533 (3d Cir. 1995) ("In administrative and judicial proceedings, the school district bears the burden of proving the appropriateness of the IEP it has proposed."), *cert. den.*, 517 U.S. 1135 (1996); *E.S. v. Independent Sch. Dist.*, 135 F.3d

566, 569 (8th Cir. 1998); *Clyde K v. Puyallup Sch. Dist.*, 35 F.3d 1396, 1398 (9th Cir. 1994).

A number of the Courts of Appeal place the burden on the school system at the administrative level, then explicitly place the burden of proof on the party challenging the administrative ruling. *E.g., E.S. v. Independent Sch. Dist.*, 135 F.3d at 569; *Clyde K v. Puyallup Sch. Dist.*, 35 F.3d at 1398.

Here, however, the Court of Appeals held that: "Administrative findings in an IDEA case 'are entitled to be considered prima facie correct. ' " (2a). The Court of Appeals relied on its previous decisions in *Hartmann v. Loudoun County Bd. of Educ.*, 118 F.3d 996, 1000-01 (4th Cir. 1997), *cert. denied*, 522 U.S. 1046 (1998), and *Doyle v. Arlington County Sch. Bd.*, 953 F.2d 100, 105 (4th Cir. 1991) in reaching this conclusion. *Id.* Placing the burden of proof on the party challenging the administrative decision has long been the law of the Fourth Circuit. *Barnett v. Fairfax County Sch. Bd.*, 927 F.2d 146, 152 (4th Cir.), *cert. den.*, 502 U.S. 859 (1991). The Seventh Circuit also places the burden of proof on the party challenging the administrative decision. *Heather S. v. Wisconsin,* 125 F.3d 1045, 1052 (7th Cir. 1997).

The Court of Appeals accepted the district court's view that "the evidence firmly supports both hearing officers' determination that the 'full inclusion' program promoted by the plaintiffs would not meet [Jane's] educational needs for core academic subjects, given her significant cognitive limitations and distractability." (2a). The district court's view of what the evidence "firmly supports" followed from its summary rejection of Petitioners' efforts to introduce into evidence testimony from their expert witness Dr. Bruns, former Director of Student Services at Falls Church School System for 21 years. The District Court also rejected the "Smoking Gun" memoranda.

The Court of Appeals decision that "the Administrative findings in an IDEA case 'are entitled to be considered prima facie correct'," (2a), is in sharp conflict with the analyses by the U.S. Court of Appeals for the Third Circuit. The Third Circuit has unequivocally ruled that the burden of proof should always lie with the school district at the administrative level and in court. *Fuhrmann v. East Hanover Bd. Of Educ.*, 993 F.2d 1031, 1034-1035 (3d Cir. 1993). The Third Circuit recognizes that the issue of burden of proof is even more important when IDEA's mainstreaming is at issue and places the burden of proving compliance with IDEA on the school. *Carlisle, supra*, 62 F.3d at 533; *Oberti v. Board of Educ.*, 995 F.2d 1204, 1219-1220 (3d Cir. 1993).

The *Oberti* Court stated: "indeed, the Act's strong presumption in favor of mainstreaming, 20 U.S.C. 1422(5)(B), would be turned on its head if parents had to prove that their child was worthy of being included, rather than the school district having to justify a decision to exclude the child from the regular classroom." *Id.* Thus, the *Oberti* Court held that not only does the School Board have the burden at the administrative hearing level of justifying its educational placement of the child, but that the burden of proving compliance with mainstreaming requirement is borne by the school regardless of which party appealed from the administrative decision to bring the claim under the IDEA before the district court. *Id.* Requiring parents to prove at the district court level that the school has failed to comply with the Act would undermine the Act's express purpose "to assure that the rights of children with disabilities and their parents are protected", 20 U.S.C. §1400 (c), and would diminish the effect of the provision that entitles parents and guardians to obtain judicial enforcement of the Act's substantive and procedural requirements. *Id.* at 1219.

Placing the burden on the school system is the only approach consistent with the purpose of IDEA. The *Oberti* analysis also follows from the logical proposition that the burden of proof rests with the advantaged party. When a dispute arises under the IDEA, where the school board is the advantaged party, with better access to information, greater educational expertise, and of course, greater access to witnesses such as teachers and experts in the field of special education, the school board should bear the burden of proof. *Id.* at 1219.

The New Jersey Supreme Court also concluded that the burden of proof should rest on the school board at all stages. *Lascari v. Board of Educ. of Ramapo Indian Hills Regional High Sch. Dist.*, 116 N.J. 30, 44, 560 A.2d 1180, 1188 (1989). The *Lascari* Court held burden of proof is like the procedural safeguards guaranteed by IDEA and that "the allocation of the burden of proof protects the rights of handicapped children to an appropriate education." 116 N.J. at 44, 560 A.2d at 1188. Placing the burdens of persuasion and production on the school district is consistent with the well settled evidentiary proposition that "the party better able to meet those burdens" should bear the burdens of persuasion and production. *Id.*

Several district courts in the Second Circuit have followed the *Oberti* approach, holding that the burden of proof should be placed on the school district because of the "obvious recognition of the school's overarching obligation to attend to the specific educational needs of children with disabilities." *Mavis v. Sobol*, 839 F. Supp, 968, 985 (N.D.N.Y. 1993); *Wall v. Mattituck-Cutchogue School District*, 945 F. Supp. 501 (E.D.N.Y. 1996). The U.S. Court of Appeals for the Second Circuit assumed without deciding that the burden of proof in an IDEA case is on the school board. *Walczak, supra*, 142 F.3d at 134 (school board "demonstrated by a clear preponderance of the evidence" that it complied with IDEA).

As the Third Circuit accurately observed in *Oberti*, "neither *Rowley* not the Act itself specifically addresses which party bears the burden of proof at the district court level, . . ." 995 F.2d at 1218. By requiring that the administrative findings "are entitled to be considered prima facie correct" the Fourth Circuit has, in essence, required that the district court affirm the administrative decision if such decision is supported by "substantial evidence." This interpretation of IDEA's review provision was soundly rejected by this Court's opinion in *Rowley*, *supra*, which rejected the "substantial evidence" standard. The Court should grant this Petition to resolve this important issue where there is a clear split in the Circuits on the burden of proof at both the administrative and judicial levels to establish a nation-wide standard. The Court should grant review because placing the burden of proof on the parents at ***both*** the administrative and judicial levels denies these parents' their statutory right of access to meaningful judicial review of the School Board's decision not to mainstream their daughter. Access to the courts should not be a function of geography.

II. THE FOURTH CIRCUIT ERRED IN AFFIRMING THE DISTRICT'S COURT'S RFUSAL TO CONSIDER EVIDENCE PROFFERED BY PETITIONERS AND ITS RULING DIRECTLY CONTRADICTS THE PROVISIONS OF IDEA AND CONFLICTS WITH THE DECISIONS MADE BY OTHER COURTS OF APPEAL.

IDEA instructs courts reviewing the decisions of state educational agencies to receive the records of the administrative proceedings . . . . ***hear additional evidence at the request of a party***, and, basing its decision on the preponderance of the evidence, . . . grant such relief as the court determines is appropriate." 20 U.S.C.§ 1415(e)(2)

(emphasis added). However, despite this express statutory directive, on January 8, 1999, the District Court granted the School Board's Motion in Limine, barring Petitioners from presenting additional evidence and ruled that the Court's analysis and decision would be based solely on the administrative record. (25 a). This ruling was consistent with the precedent of the Fourth Circuit, that Petitioners could not put on any additional evidence that was not in the administrative record. (9a) (citation omitted). This ruling is inconsistent with the plain language of the statute, this Court's decision in *Rowley*, and the views of most of the Courts of Appeal addressing this issue.

In *Rowley* the school board argued that the administrative findings should be upheld by the district court if supported by substantial evidence. This Court stated:

> Congress expressly rejected provisions that would have so severely restricted the role of reviewing courts. In substituting the current language of the statute for language that would have made state administrative findings conclusive if supported by substantial evidence, the Conference Committee explained that Courts were to make "independent decision[s] based on a preponderance of the evidence. *Rowley* at 205 (citations omitted).

In *Rowley*, the Supreme Court admonished that "courts must be careful to avoid imposing their view of preferable educational methods upon the States." 458 U.S. at 207. This Court explained that the preponderance of the evidence standard was "by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities" and, accordingly, it directed courts to give "due weight" to the administrative process and temper their review with deference to school agencies' expertise. *Id.* at 205-06. The requirement that courts give "due weight" to administrative proceedings obliges the courts

to determine how much weight is "due." *Capistrano Unified Sch. Dist. v. Warterberg*, 59 F.3d 884, 891 (9th Cir. 1995).

The courts that have addressed the issue have recognized the paradoxical position of the district court as both an independent fact finder and a judicial body bound to review and give deference to the findings of an administrative agency. The Circuits have interpreted the directive to give "due weight" to the administrative process in different ways.

As the Court of Appeals for the Ninth Circuit has observed, "judicial review in IDEA cases differs substantially from judicial review of other agency actions, in which courts generally are confined to the administrative record and are held to a highly deferential standard of review." Because IDEA requires a district court to hear additional evidence at the request of a party, a district court "does not use the substantial evidence standard typically applied in the review of administrative agency decisions, 'but instead must decided independently whether the requirements of IDEA are met'." *Murray v. Montrose County Sch. Dist.*, 51 F.3d 921, 927 (10th Cir. 1995) (citation omitted).

The Tenth Circuit described the standard of review as a "modified de novo review," or as "involved oversight." *Murray*, 51 F.3d at 927 (citations omitted); *Teague Indep. Sch. Dist. v. Todd L.*, 999 F.2d 127, 131 (5th Cir. 1993) ("In explicitly adopting the view that the district court's review of the hearing officer's decision is virtually de novo, we join the First, Seventh, Ninth and Eleventh Circuits."); *Lenn v. Portland School Committee*, 998 F.2d 1083 1086 (1st Cir. 1993) (IDEA "contemplates an intermediate standard of review," which, because it is characterized by independence of judgment, "requires a more critical appraisal of the agency determination than clear-error review entails, but which nevertheless, falls well short of complete de novo review."). The Ninth Circuit suggested a resolution of the "puzzling

procedural problem" presented whenver the district court adjudicates an IDEA action. *Capistrano*, 59 F.3d at 892 (the district court should "read the administrative record, consider the new evidence, and make an independent judgment based on a preponderance of evidence and giving due weight to the hearing officer's determinations.

Thus, the courts of appeal differ in their understanding of the interplay between the Supreme Court's "due weight" interpretation and IDEA's provision for independent judicial review. In this instant case, the Fourth Circuit affirmed the decision of the District Court which adopted the findings made in the administrative process after refusing to consider any of the evidence proffered by Petitioners in the trial court. Thus, the courts below erroneously interpreted *Rowley* to limit IDEA's directive that the district court "shall hear additional evidence at the request of a party."

The Court of Appeals for the First Circuit was the first court of appeals to analyze IDEA's directive that a district court shall hear additional evidence at the request of a party. *Burlington*, 736 F.2d 773, 790, *aff'd on other grounds*, 471 U.S. 359 (1985). The *Burlington* court held that the word "additional" should be construed in the ordinary sense of the word to mean "supplemental." *Id.* Thus construed, IDEA "contemplates that the source of the evidence will be the administrative hearing record, with some supplementation at trial." *Id.* Reasons for supplementation would include, but were not limited to the "unavailability of a witness, an improper exclusion of evidence by the administrative agency and evidence concerning relevant events occurring subsequent to the administrative hearing." *Id.* The Ninth Circuit has also construed "additional" to mean "supplemental." *Ojai Unified Sch. Dist. v. Jackson*, 4 F.3d 1467, 1472-73 (9th Cir. 1993.

The Sixth Circuit expressly disagreed with the interpretation of the *Burlington* court and rejected the view that

additional evidence is admissible only in limited circumstances. *Metropolitan Gov't of Nashville v. Cook*, 915 F.2d 232 234, (6th Cir. 1990). The Tenth Circuit adopted a view similar to that articulated by the Sixth Circuit. *Murray*, 51 F.3d at 930-931, & n. 15, holding that additional evidence is generally admissible. Although the District Courts in the Second Circuit are split on the extent to which additional evidence may be admitted, the better reasoned decision allow the parties to present additional evidence. *Mavis v. Sobol*, 839 F. Supp. 968, 969 (N.D.N.Y. 1993) (also discussing the First and Sixth Circuit positions).

The Third Circuit takes an intermediate position, holding that it is not within the trial court's discretion to reject the party's offer of additional evidence without even evaluating it for its admissibility. *Susan N. v. Wilson School District*, 70 F.3d 751, 762 (3rd Cir. 1995).

Nearly all of the Circuits have rejected the rule of law adopted by the Fourth Circuit, which is to refuse to allow testimony in court from all who did, or could have, testified before the administrative hearing. "[A] rigid rule to this effect would unduly limit a court's discretion and construct its ability to form the independent judgment Congress expressly directed." *Burlington, supra,* 736 F.2d at 791. Accordingly, *Burlington* specifically rejected a proposal that would limit expert testimony to the administrative hearing and ruled that expert testimony not presented at the administrative level should be considered by the trial court. *Id.*

In view of the Fourth Circuit's decision which is inconsistent with IDEA and the approach taken by the majority of the courts of appeal, this Court should grant review of the Fourth Circuit's refusal to allow Petitioners to introduce "additional evidence" and reverse the decision restricting judicial review to the administrative record. Since,

as one court observed, "the process for district court review of IDEA actions is conceptually quizzical," *Wall v. Mattituck-Cutchogie School Dist.*, 945 F. Sup. 501, 503 (E.D.N.Y. 1996), the court should end the confusion and disagreement among the courts by accepting this issue for review.

III. THE DISTRICT COURT ERRONEOUSLY CHARACTERIZED PETITIONERS' CLAIM OF SYSTEMIC VIOLATIONS OF §504 AND §1983 AS "DERIVATIVE" OF THE IDEA CLAIMS AND DENIED PETITIONERS A JURY TRIAL ON THESE CLAIMS ON THE SPURIOUS GROUNDS OF FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES.

Jane Doe's placement in the self-contained class is simply a manifestation of the School Board's policy and practice of segregating those with special educational needs. Rather than engage in a careful child-by-child analysis of the proper placement, the School Board places a very large number of students in self-contained class rooms under the pretext that this is in the best interest of the child. Notwithstanding this unambiguous recognition of serious systemic deficiencies in its Special Education program, the School Board has failed and refused to remedy the problems in the provision of special education services as highlighted in the Special Education Department's memoranda. (27a-31a). Indeed, the School Board has a custom or practice of failing to enforce the IDEA and §504 of the Rehabilitation Act.

IDEA generally requires that for persons seeking relief under §504, to exhaust their administrative remedies to the same extent as would be required had the action been brought under IDEA. 20 U.S.C. §1415(l). However, there is a split in the Circuits as to whether exhaustion would be required under the circumstances present here.

The District Court's ruling that failure to raise the issue of systemic violations §504 and §1983 at the administrative level barred judicial consideration is inconsistent with IDEA for several reasons. First, the regulations governing due process hearings in Virginia do not allow the parents to raise at the administrative hearing issues of systemic or class wide violations of the law. Where the administrative remedies afforded by the due process hearing are inadquate given the relief sought, Petitioners are not required to exhaust their administrative remedies. *Weber v. Cranston School Comm.* ___F.3d ____, (1st Cir. May 8, 2000), slip op. at 12, *citing*, *Christopher W. v. Portsmouth Sch. Comm.*, 877 F.2d 1089, 1094 (1st Cir. 1989).[4]

Second, exhaustion is not required, because the Hearing Officers lacked the authority to order the School Board to implement IDEA policies pursuant to the standards discussed in the "Smoking Gun" memoranda. Since the systemic relief sought by Petitioners in their §504 claim was not available in the due process hearings, exhaustion of such claims would be futile and hence is not required under §1415(l). *Weber, supra*, slip op. at 12 and n. 13.

Third, exhaustion under §1415(l) is not required for Petitioners' claims for money damages arising under §504 and §1983 because, by the plain terms of §1415, exhaustion is not required where monetary relief under those statutes is unavailable under IDEA. *Witte v. Clark County Sch.Dist.*, 197 F.3d 1271, 1275, (9th Cir. 1999). *But see, Charlie F. v.*

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[4] The legislative history of IDEA indicates a particular concern with futility. Senator Williams, the principal author of the Education of the Handicapped Act, the predecessor to IDEA stated that "exhaustion of administrative procedures established under this part should not be required for any individual complainant filing a judicial action in cases where such exhaustion would be futile, either as a legal or practical matter." *Christopher W, supra*, 877 F.2d at 1094 (citation omitted).

Board of Educ. of Skokie Sch. Dist., 98 F.3d 989, 991 (7th Cir. 1996).

Fourth, exhaustion is not required because Petitioners were not aware of and did not have the Smoking Gun memoranda when they exhausted their administrative remedies. The School Board's successful efforts to keep these memoranda secret prevented the Does from seeking to raise this issue in the administrative proceedings. Requiring exhaustion with respect to a secret policy unlawfully imposes an impossible burden on Petitioners. Requiring Petitioners to have raised this issue in the administrative proceedings, at a time when the Board successfully concealed evidence of its policy of noncompliance with the law would turn the doctrine of administrative remedies on its head.

There is a split in the Circuits as to whether exhaustion is required on claims raised under §504 and §1983, particularly where Petitioners were unaware of the existence of a the School Board's official policy of failing and refusing to comply with the law at the time they exhausted their administrative remedies and where such exhaustion would have been futile. *See, Sims v. Apfel*, 68 *U.S.L.W.* 4470, 4473 (June 5, 2000) (issue exhaustion is not required). This Court should review this case to resolve a conflict among the Courts of Appeal as to whether exhaustion is required.

Petitioners are entitled to a jury trial on their §504 and §1983 claims and these issues should be tried before and decided by a jury, ***prior*** to issues to be decided by the Court, so that their Seventh Amendment rights are not foreclosed on common factual issues. *Lytle v. Household Mfg., Inc., supra*; *Curtis v. Loether*, 415 U.S. 189 (1974); *Thomas v. Denny's, Inc.*, 111 F.3d 1506, 1512-1513 (10th Cir. 1997). If the jury finds that the School Board's policy is contrary to §504 and §1983 and that Petitioners' rights under these laws have been violated, then these findings are binding on the court's analysis of the IDEA claims, which should be decided only

after the jury renders a verdict on Petitioners' damages claim. The Court should grant review of this issue because the decision of the Fourth Circuit is inconsistent with the views of other Courts of Appeal on the issue of exhaustion and inconsistent with the views of this Court on Petitioners' Seventh Amendment right to jury trial.

CONCLUSION

The Petition for a writ of *certiorari* should be granted to resolve these issues of national importance.

Respectfully submitted,

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